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<u>COMMENTS ON BEHALF OF THE CAN MANUFACTURERS' COALITION CONCERNING APPROPRIATE ACTION UNDER SECTION 203 OF THE TRADE ACT OF 1974 WITH REGARD TO TIN MILL IMPORTS</u>

Valerie A. Slater, Esq.
S. Bruce Wilson, Esq.
Karen Bland Toliver, Esq.
Wendy E. Kamenshine, Esq.

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.

Robert S. Strauss Building
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

Counsel to the Can Manufacturers' Coalition

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EXECUTIVE SUMMARY

The Can Manufacturer's Coalition ("CMC"), a group of U.S. producers of steel food cans and other consumer and industrial steel packaging made from tin mill products urges the President to treat the "tie" decision of the International Trade Commission ("ITC") with respect to tin mill products as a negative injury determination**.**

- **A clear majority of the ITC (4 commissioners) found the separate U.S. tin mill industry to be the industry producing the products "like or directly competitive with" tin mill imports. They assessed serious injury and substantial causation based on an examination of the separate U.S. industry producing tin mill products. To comply with U.S. law and WTO obligations, the President should defer to the factual, "like or directly competitive" product finding of the Commission majority.**

- **Three of the four Commissioners who evaluated the impact of tin mill products on the domestic tin mill industry determined that tin mill imports are not a substantial cause of serious injury to the domestic industry. The majority decision of this group of Commissioners, who each followed the majority approach in defining the appropriate like product, should be taken as the determination of the Commission.**

- **Serious issues of WTO compliance are raised by "counting" the tin mill votes of the two Commissioners who took a minority view on like product, and of Commissioner Miller, whose affirmative determination violates WTO principles of "parallelism" in safeguard injury and remedy determinations.**

If the President, nonetheless, treats the Commission's findings on tin mill products as an affirmative determination, the President should elect to provide adjustment assistance and not to impose tariffs or quantitative restrictions on tin mill imports

- **Prohibitive duties, or any measures that artificially raise the price of tin mill products, would hurt tin mill producers and can manufacturers alike.** Duties of 20-40% would increase the price of tin mill products and the downstream products produced by can manufacturers, i.e., food cans, aerosol cans and other steel containers. The industry is already suffering from declining consumption due to shifts to alternative packaging, such as plastic and glass. Increases in the price of cans will result in further shifts to alternate products and reduced consumption of tin mill products.

- **Quantitative restrictions on tin mill products will not help the domestic tin mill industry**. The only surge in imports occurred in 1999 as Japanese imports increased dramatically. That surge was remedied with the imposition of an antidumping order against

Japanese tin mill products in 2000. Tin mill imports have already returned to pre-surge historical levels.

- **Only a small portion of U.S. tin mill requirements have been (or will be) filled by tin mill imports**. Currently, non-NAFTA tin mill imports represent only about 12% of the U.S. tin mill market. In addition, as a majority of those ITC commissioners who examined the tin mill market found, imports are not likely to surge. Foreign suppliers are not likely to increase their shipments and U.S. can manufacturers, in any event, necessarily source most of their tin mill needs from domestic suppliers and intend to continue to do so.

- **Import duties or quantitative restrictions will impose a heavy and undue economic burden on domestic can manufacturers** While the domestic can industry relies on imports for only a limited portion of its tin mill supply**, much of that supply consists of products not available from domestic producers. The confidential version of the ITC Report to the President (at 81) indicates the percentage of tin mill imports that are not available from domestic suppliers.** The additional costs that import restrictions will impose on can manufacturers—who are already suffering from difficult market conditions – cannot be justified by and would outweigh any benefit to domestic tin mill producers.

- **Much of the limited quantity of tin mill imports is necessary as an alternative source of supply in the event of disruptions to domestic production.** Catastrophic events at domestic facilities have made it critical for U.S. can manufacturers to maintain qualified sources of foreign supply.

- **Trade adjustment assistance would be a meaningful remedy for the domestic tin mill industry**. The tin mill industry has been affected by other factors unrelated to imports, including overcapacity and declining consumption. The domestic industry has taken steps recently to rationalize production (two plants have closed). These steps will improve the position of tin mill producers in the United States. Trade adjustment assistance for the workers affected by these difficult but necessary closures would be an appropriate remedy.

- **If some other remedy other than trade adjustment assistance is to be is to be applied to tin mill imports, the only measure that should be considered for tin mill products is a quota** that permits importation of the normal, longstanding historical level of tin mill imports at market-determined prices.

I. INTRODUCTION

These comments are submitted on behalf of the Can Manufacturers' Coalition ("CMC"), a group of large U.S. producers of food cans and other consumer and industrial steel packaging made from tin mill products.[1] As a majority of the Commissioners found in this proceeding, tin mill products comprise a commercially distinct industry, and U.S. producers of tin mill products confront distinct market conditions in terms of demand, supply, and pricing.[2]

While the tally of Commission votes in this proceeding resulted in a tie with respect to tin mill products,[3] as we detail below, there are compelling reasons for the President to treat the Commission's decision as a negative determination with respect to tin mill imports. However, should the President treat the Commission's finding as affirmative, CMC urges the President to reject the suggestion that prohibitive duties be imposed on tin mill imports. A tariff-based remedy will not benefit domestic tin mill producers, but will hurt both domestic tin mill producers and steel can manufacturers by further reducing demand for steel containers and the tin mill products from which they are made.

II. THE PRESIDENT SHOULD FIND THE NEGATIVE INJURY DETERMINATIONS OF COMMISSIONERS KOPLAN, OKUN, AND HILLMAN TO BE THE DETERMINATION OF THE COMMISSION

The International Trade Commission was equally divided on whether increased imports of tin mill products are a substantial cause of serious injury, or threat thereof, to a domestic

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[1] The members of the CMC include Ball Corporation, BWAY Corporation, Crown Cork & Seal Company, Inc., and United States Can Company.

[2] See Steel, Inv. No. TA-201-73, Volume I: Determinations and Views of Commissioners, USITC Pub. 3479 at 48-49 (Dec. 2001) (hereinafter "ITC Report"). See also CMC Prehearing Brief on Injury, Sept. 10, 2001; Joint Prehearing Brief of Respondents: Product Group 7, Tin Mill Products, Sept. 11, 2001.

[3] ITC Report at 1, n.1.

industry.[4] Consequently, the President may take either finding as the Commission's determination when deciding the appropriate course of action with respect to tin mill imports.[5] The President's discretion may not be exercised in a vacuum but must respect both the applicable statutory framework and U.S. obligations under the WTO Safeguards Agreement. In this case, these important considerations weigh heavily in favor of treating the Commission's results as a negative determination with respect to tin mill imports.

A. To Be Consistent With Statutory Requirements, The President Should Follow The Commission Majority's Like Product Determination

In deciding whether to treat the Commission's determination with respect to tin mill products as an affirmative or negative determination, the President should first recognize that the Commission was not evenly divided on the issue of like product: four out of the six Commissioners found that the distinct industry producing tin mill products constitutes the product "like or directly competitive" with tin mill imports. Accordingly, they analyzed the impact of tin mill imports only on domestic tin mill producers.[6] A majority of those Commissioners – three out of the four – found that tin mill imports are not a substantial cause (or threat) of serious injury to domestic tin mill producers.[7] The President should follow the Commission majority's view of the like product in this proceeding and adopt the same majority's negative injury determination.

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[4] See Steel, Inv. No. TA-201-73, Volume I: Determinations and Views of Commissioners, USITC Pub. 3479 at 1, n.1 (Dec. 2001) (hereinafter "ITC Report").

[5] 19 U.S.C. § 1330 (d).

[6] ITC Report at 48-49.

[7] Id. at 74-78.

Congress has vested exclusive statutory authority in the International Trade Commission to identify and define the relevant domestic industry in safeguard investigations.[8] The threshold finding that defines the relevant domestic industry establishes the scope of the domestic products that are "like or directly competitive with the imported product" as well as the universe of domestic producers of that product.[9] As recognized by the Commission, this determination is a factual finding that serves as the foundation for examining all of the relevant statutory criteria in safeguard investigations.[10] Indeed, in this proceeding, the Commission has confirmed the sequential approach embodied in the statute:

> To determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof, the Commission first defines the "domestic industry producing an article that is like or directly competitive with the imported article."[11]

Following this sequence, once the Commission identifies the scope of the products subject to investigation and the relevant domestic industry, it then examines record evidence concerning import levels and the statutory criteria of injury and causation. Adhering to this sequence ensures consistency between the imported merchandise being examined and the universe of domestic producers potentially impacted by those imports.

In this instance, based upon extensive analysis of the record evidence and following the Commission's well-established analytical framework, 4 out of the 6 Commissioners (Koplan,

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[8] 19 U.S.C. § 2252(b)(1)(A).

[9] Id.

[10] See e.g., ITC Report at 30 ("The decision regarding the like or directly competitive article is a factual determination"). It should be noted that all six Commissioners joined this discussion of the legal standards and statutory framework.

[11] Id. at 29 (emphasis added).

Okun, Hillman and Miller) determined -- in a single, joint opinion -- that tin mill products constitute a separate "like or directly competitive" product.[12] Finding significant differences in the production processes,[13] the degree of integration among U.S. producers,[14] and in end-uses and customers,[15] a clear majority of the Commissioners thus concluded that the commercial realities of the marketplace mandated a finding that domestic tin mill producers constitute a separate industry from other flat-rolled products, and therefore, tin mill products should not be included in a broader "like product" category comprised of other flat-rolled products.[16] Thus, a clear and unified Commission majority decided to treat tin mill products as a separate industry.

Departing from the majority view, Commissioners Bragg and Devaney subsumed tin mill products in a broader "like or directly competitive" product category comprised of all flat-rolled products.[17] They did not therefore, separately examine or consider the impact of tin mill imports on the tin mill industry found by the majority of Commissioners to be the industry producing the "like or directly competitive" product.

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[12] Id. at 48-49.

[13] The Commissioners noted that "the cold-rolled feedstock used to make tin mill products generally is more extensively further processed than is required to produce other finished products such as coated steel." ITC Report at 48.

[14] The Commissioners noted that U.S. tin mill producers tend to be less integrated than other producers of flat products. ITC Report at 48.

[15] The Commissioners noted that tin mill products are sold "almost exclusively" for the production of food and industrial packaging, finding that "they are unsuitable for other end uses." ITC Report at 48.

[16] ITC Report at 49 ("we find that there is a clear dividing line between tin mill products and certain carbon flat-rolled steel and GOES. Therefore, we define a separate domestic article, tin mill products, that is like the corresponding imported tin mill imports. Accordingly, we define the domestic industry as producers as a whole of tin mill products like the imported tin mill products.").

[17] ITC Report at 48, n. 163 (noting Commissioner Devaney's decision not to join the majority's finding with respect to treating tin mill products as a separate like product); Separate Views on Injury of Commissioner Lynn M. Bragg, ITC Report at 269 (identifying tin mill products as one of several product categories included in her decision to treat carbon and alloy flat products as a single like product).

The division of authority embodied in the statute vests the Commission with exclusive authority to define the relevant domestic industry and make injury findings concerning that industry.[18] The President's considerable authority is exercised in deciding the appropriate course of action based upon the Commission's fact-finding.[19] Where, as here, a majority of the Commissioners makes a finding that, consistent with the statutory framework, defines the appropriate domestic industry to be analyzed, the President's action should be consistent with the Commission majority's view. Failure to do so ignores the clear statutory framework and unreasonably usurps the Commission's fact-finding authority under 19 U.S.C. § 2252.

Therefore, consistent with the statutory framework, the only Commission injury determinations that should be taken into account by the President are those by the Commissioners who analyzed tin mill products as a separate industry – Commissioners Koplan, Okun, Hillman, and Miller. Importantly, a majority of these Commissioners (Koplan, Okun, and Hillman) -- three of the four -- found that tin mill imports are not a substantial cause of serious injury, or threat of serious injury, to the domestic tin mill industry.[20] Given that three of the four injury determinations are based only upon an analysis of the impact of tin mill imports on U.S. tin mill producers – the relevant domestic industry as found by the Commission majority – these three votes should be taken as the decision of the Commission.

B. Adopting The Affirmative Determinations Of Commissioners Bragg, Devaney, and Miller Would Violate U.S. WTO Obligations

[18] See 19 U.S.C. § 2252(b)(1)(A); § 2252(c)(6).

[19] 19 U.S.C. § 2253 (a)(1)(A) and (a)(2).

[20] ITC Report at 74-78.

A decision to adopt the affirmative injury determinations of Commissioners Bragg, Devaney, and Miller would violate U.S. obligations under the WTO. The WTO Safeguards Agreement authorizes the imposition of remedial measures only after a finding that increased imports are a substantial cause of or threaten to cause serious injury to the producers of products "like or directly competitive" with the imported merchandise.[21] As demonstrated above, the injury determinations of Commissioners Bragg and Devaney do not reflect the Commission majority's finding that domestically-produced tin mill products are the products that are "like or directly competitive" with tin mill imports. Simply put, Commissioners Bragg and Devaney failed to analyze the impact of tin mill imports on the appropriate industry that meets the definition contained in Article 4.1 of the Safeguards Agreement.[22] Therefore, these two Commissioners' findings cannot be construed as a finding by "the competent authority" as required by the WTO Safeguards Agreement.[23]

In addition, although Commissioner Miller joined the majority in analyzing tin mill products as a separate industry, Commissioner Miller's determination fails to satisfy the "parallelism" doctrine embodied in the WTO Safeguards Agreement. In accordance with this doctrine, WTO Members are obligated to ensure consistency between the scope of the identified

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[21] Article 1.2 of the Agreement on Safeguards: "A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the procedures below, that such product is being imported into its territory in such increased quantities . . . . and under such conditions as to cause or threaten to cause serious industry <u>to the domestic industry that produces like or directly competitive products</u>." (emphasis added).

[22] Article 4.1 (c) of the Safeguards Agreement defines "domestic industry" as producers of products that are like or directly competitive with the imported product.

[23] <u>See</u> Article 3.1 of the Safeguards Agreement ("A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member . . ."); Article 4.2 (a) of the Safeguards Agreement ("In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry . . .").

injurious imports and the scope of imports subject to remedial measures.[24] Remedial measures may exclude certain categories of imports that were included in the injury analysis only if the investigating authority has made an explicit finding that all other imports satisfy the requisite evidentiary criteria for application of the safeguard measure. This obligation applies even if NAFTA-origin imports are excluded from any safeguard measure imposed by the United States:

> Our understanding of the principle of parallelism is that if the United States were, on the basis of Article XXIV, to exclude imports from Canada and/or Mexico from the scope of its safeguard measures, the United States must establish explicitly that imports from sources other than Canada and/or Mexico satisfied the Article 2.1 conditions for the application of a safeguard measure.[25]

Commissioner Miller's affirmative injury determination falls short of the requisite parallelism standards. Commissioner Miller's determination included an affirmative finding as to Canada. Specifically, Commissioner Miller concluded that "imports of tin mill products from Canada account for a substantial share of total imports and contribute importantly to the serious injury."[26] However, while Commissioner Miller's affirmative finding included Canadian imports,[27] any remedy applied to tin mill imports will not include Canada because all of the other Commissioners rendered negative determinations with respect to Canadian imports.[28] The

[24] See United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, AB-2000-10, WT/DS/AB/R, ¶ 98 (finding the Commission's determination in violation of Article 2.2 of the Safeguards Agreement because the Commission "did not make any explicit determination relating to increased imports *excluding imports from Canada*) (emphasis in original). United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/R, ¶¶ 7.149 – 7.162 (hereinafter "Line Pipe from Korea").

[25] Line Pipe from Korea at ¶ 7.162.

[26] ITC Report at 310.

[27] Commissioner Miller's injury analysis is based on data that includes the volume of Canadian imports. See ITC Report at 308-09.

[28] See ITC Report at 17-18.

President should disregard Commissioner Miller's affirmative vote as to tin mill products, therefore, because it violates the WTO requirement for "parallelism" between injury findings and remedial actions.

CMC recognizes, of course, that Commissioner Miller added a footnote to her affirmative injury determination stating that she would have made an affirmative injury determination even if Canadian imports were excluded from the analysis.[29] That brief note, however, falls far short of satisfying the parallelism requirements. Specifically, Commissioner Miller failed to make an "explicit finding" that all other imports (excluding Canadian imports) are a substantial cause of serious injury. Although Commissioner Miller's brief footnote identifies increased imports from non-Canadian sources over the period of investigation, she did not undertake a causation analysis for non-Canadian imports alone.

Despite the fact that a WTO panel has yet to squarely address the extent to which an investigating authority must perform the additional analytical step to satisfy the parallelism requirements, it is clear that Commissioner Miller's simple citation of data points comparing Canadian to all other tin mill imports -- but not analyzing causation – does not rise to the level of an explicit injury and causation finding contemplated under the parallelism doctrine.[30] As such, Commissioner Miller's affirmative determination is highly unlikely to withstand scrutiny under the WTO Safeguards Agreement.

[29] Id. at 310, n.29.

[30] For example, Commissioner Miller compares the market share held by other imports with the market share held by Canadian imports and concludes that Canadian market share showed a smaller increase. ITC Report at 310, n.29. ("In addition, the U.S. market share held by these imports increased by 2.9 percentage points over the period, while imports from Canada as a share of the U.S. market increased by only 1.3 percentage points"). Commissioner Miller also notes "{t}he pricing data collected by the Commission show no underselling by imports from Canada." Id.

These WTO compliance issues provide further reason for not adopting as the Commission's determination the affirmative injury findings of Commissioners Bragg, Devaney, and Miller. A decision to treat these findings as the Commission's affirmative injury determination would not only usurp the Commission's statutory authority to determine the like product but would also needlessly render the United States vulnerable to WTO challenges.

C. Previous Action By The United States Has Remedied Any Adverse Impacts of Significant Tin Mill Import Volumes

Another compelling reason for the President to adopt the three Commissioners' negative determinations as the Commission's decision are the indisputable facts that antidumping relief has remedied the sole surge in tin mill imports observed during the period of investigation ("POI"), and that there is little likelihood of any future import surges. The facts are strikingly similar to those in Extruded Rubber Thread, where the President took the Commission's tie injury vote as a negative determination.[31] CMC urges the President to consider the strong parallels between tin mill imports and the Extruded Rubber Thread proceeding.

In Extruded Rubber Thread, it was evident that the observed increase in import quantities was attributable to unfairly traded imports from Malaysia. Just prior to the safeguard investigation, however, Malaysian imports had been effectively disciplined by antidumping and countervailing duty orders.[32] Thus, the Commissioners who voted in the negative did so, in part, based upon evidence that the domestic rubber thread producers had sought and successfully

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[31] See Letter from President George Bush to Ambassador Hills, Jan. 15, 1993 (declaring a decision to accept the findings of the Commissioners with negative votes in deciding the appropriate course of action pursuant to the Commission's results of the safeguard investigation); Extruded Rubber Thread, Report to the President on Inv. No. TA 201-63 Under Section 202 of the Trade Act of 1974, USITC Pub. No. 2563 (Dec. 1992) at 1 (reporting an equally divided vote on whether imports of extruded rubber thread were being imported in such increased quantities as to cause serious injury to the domestic industry) (hereinafter "Extruded Rubber Thread").

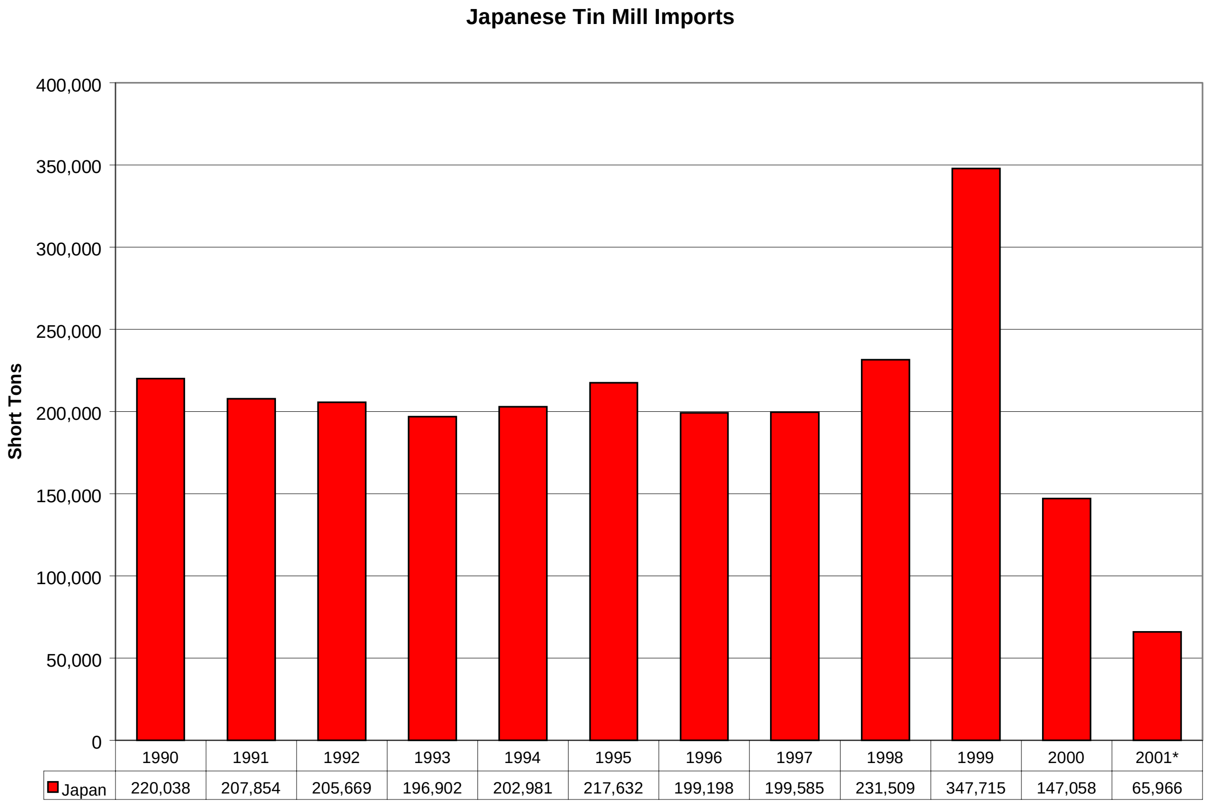
[32] Extruded Rubber Thread at 58.

obtained relief from injurious imports prior to the safeguard proceeding.[33] The President's decision to treat the Commission's tie vote in Extruded Rubber Thread as a negative determination suggests that if the domestic industry has obtained import relief prior to the safeguard proceeding, then it is entirely reasonable to decline additional remedial action.

The circumstances with respect to tin mill imports are strikingly similar in this proceeding. As shown in **Table 1,** Japanese tin mill imports have declined dramatically since 1999, due to the imposition of provisional and final antidumping relief on Japanese tin mill imports in 2000.

[33] Id. at 69-70 ("Three U.S. government actions in recent months have made it highly unlikely that the import trends of the last several years will 'continue unabated.' The removal of Malaysian extruded rubber thread from GSP eligibility and the U.S. Department of Commerce's issuance of countervailing duty and antidumping duty orders on such thread from Malaysia, are likely to raise import prices substantially, thus reducing import levels and decreasing any chance that imports will cause serious injury in the future.").

Table 1

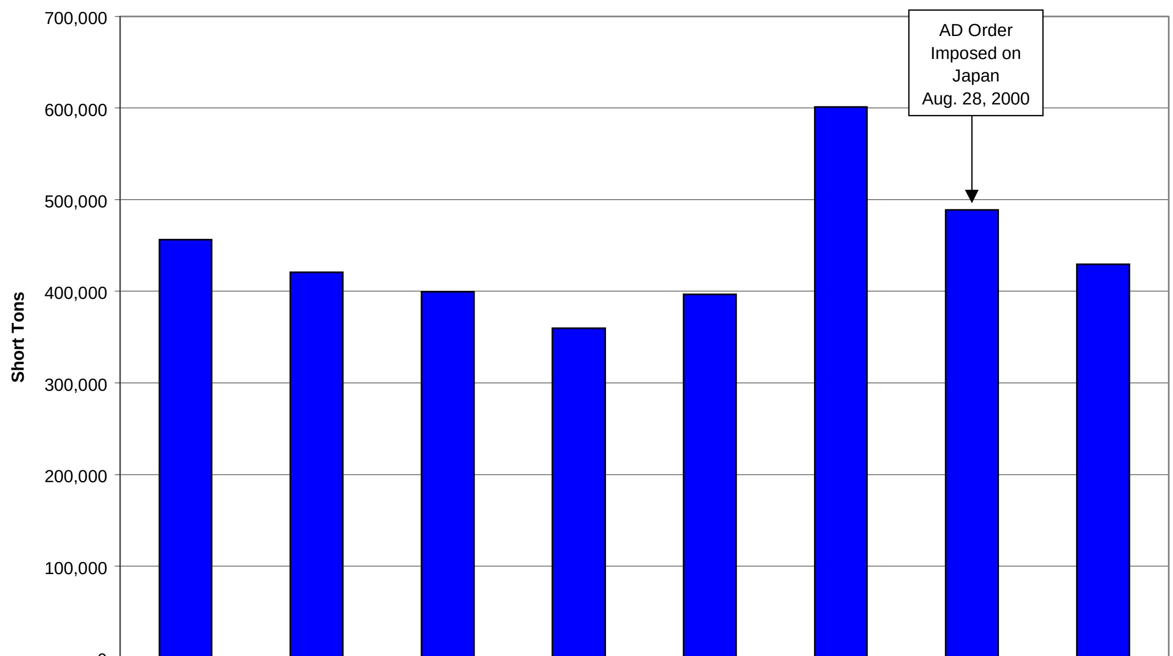


Thus, relief provided under the antidumping laws has quite effectively returned tin mill import volumes to normal, pre-surge levels. See **Table 2.** Because Japan is one of the largest traditional foreign sources of tin mill products to the U.S. market, the discipline on Japanese imports also diminishes the likelihood of future import surges.[34]

[34] ITC Report at 78.

Table 2

Non-NAFTA Tin Mill Imports Have Returned to Historical Levels



	1994	1995	1996	1997	1998	1999	2000	2001*
Non-NAFTA	456,479	420,797	399,299	359,561	396,721	601,110	488,591	429,422

Moreover, there is no threat of future import surges stemming from other sources. As found by Commissioners Koplan, Okun and Hillman, tin mill imports have declined dramatically in recent years.[35] Foreign tin mill capacity is stable with no indication that foreign suppliers have sufficient excess capacity to direct exports to the U.S. market and disrupt U.S. market conditions.[36]

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[35] Id. at 77.

[36] Id. at 78.

Even more importantly, as in Extruded Rubber Thread, the record evidence in this proceeding points to other important factors that explain the domestic industry's condition.[37] In particular, several other causes of injury were established, including:

- the significant decline in domestic consumption of tin mill products that has put downward pressure on domestic shipments and pricing since as early as the 1970's;[38]
- the failure of domestic producers to rationalize capacity until quite recently;[39]
- the consolidation of U.S. purchasers which compelled U.S. producers to lower prices to maintain production capacity.[40]

Commissioners Koplan, Okun, and Hillman examined the record evidence and agreed. These three Commissioners concluded that domestic tin mill producers' current financial condition is attributable to factors that occurred prior to the POI, and found the absence of any substantial causal link between tin mill imports and the domestic industry's serious injury during the POI.[41] As in Extruded Rubber Thread, evidence of other causal factors for domestic tin mill producers' condition is a strong indication that imports are not a substantial cause of serious injury.

In sum, CMC respectfully submits that the factors identified provide a sound basis to treat the Commission's results as a negative determination with respect to tin mill products.

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[37] In Extruded Rubber Thread, the Commissioners who issued negative determinations identified other important causes of the domestic industry's condition, such as exit of one of the largest U.S. producers from the market for reasons other than import competition as an explanation for the downward trends in the data. Id. at 75-77.

[38] ITC Report at 76.

[39] Id. at 76-77.

[40] Id. at 77, n.422. See also Certain Steel Products, Inv. No. TA-201-73, Joint Prehearing Briefs of Respondents: Product Group 7, Tin Mill Products, Sept. 11, 2001.

[41] Id. at 76-77. Commissioners Bragg and Devaney, as discussed supra, did not examine the health or causation with respect to the tin mill industry, having decided to include tin mill producers in a broader flat-rolled industry.

III. SHOULD THE PRESIDENT TREAT THE COMMISSION'S RESULTS AS AN AFFIRMATIVE DETERMINATION, PROHIBITIVE TARIFFS ON TIN MILL IMPORTS ARE NOT APPROPRIATE

Even if the President does not treat the Commission's decision as a negative one, CMC urges the President to reject the recommendation by Commissioners Miller, Bragg and Devaney to impose additional, prohibitive levels of duties on tin mill imports. Additional duties on tin mill imports will impose greater economic costs than benefits to the detriment of both domestic tin mill producers and U.S. steel can manufacturers. This is true for several reasons.

First, additional tariffs may increase domestic tin mill prices, but this price increase will only make tin mill products more expensive, increase the cost of packaging made from tin mill products, and cause or accelerate switching to alternative forms of packaging. As recognized by a majority of the Commissioners who examined the tin mill product, the steady decline in U.S. tin mill consumption during the POI (and even before the POI) is attributable to increased use of other forms of packaging such as aluminum and plastic.[42] Indeed, based on extensive evidence presented to the International Trade Commission, Commissioners Koplan, Okun, and Hillman concluded that the "evidence demonstrates that such switches to alternative forms of packaging typically are permanent."[43] (emphasis added)

Even a limited price increase of tin mill products can be the determining factor in consumers' decisions to shift from steel packaging. Mr. Thomas Scrimo of U.S. Can Company discussed this impact with respect to one segment of the steel packaging market, paint cans:

> Today, about 350 million one-gallon paint cans produced in the United States each year are made of steel. Paint can buyers are continually evaluating the economics of shifting from steel to

[42] Id. at 75.

[43] Id.

> plastic. We believe a cost difference of as little as two to three percent would lead customers to switch. Behr Paint has already switched around 30 million one-gallon paint cans it currently purchases annually from steel to plastic. Restrictions on tin mill products will have the effect of shrinking the already declining demand for tin mill products to the detriment of both domestic steel producers and can manufacturers. <u>Paint cans that could be switched to plastic account for about three percent of the tin mill consumed in the United States,</u> but they are just one example of the shifts that are likely to occur, if tin mill prices are pushed up. [44]

Mr. Marc Seanor of Ball Corporation, one of the largest can manufacturers for the food industry, also explained to the Commission how tin mill consumption would decline further if tin mill products become more expensive:

> Steel packaging currently competes vigorously with alternative forms of packaging such as plastic, aluminum and glass. While decisions concerning the type of packaging used for food and consumer products take into account a variety of factors, cost is a significant consideration in our customers' decisions concerning their choice of packaging. Furthermore, many of our customers are continually evaluating potential shifts from steel to alternate packaging forms.
>
> . . . There are certain segments of the food packaging market that are currently particularly vulnerable to shifts at the current time. For example, the large one-gallon steel cans used to package food for institutional use, and 6-ounce pet food cans are products segments in which customers have converted or are actively evaluating moves to plastic pouch alternatives. <u>Together, these two products segments alone account for about 11 percent of the tin mill products used in the United States</u>.[45]

Thus, these three packaging product segments <u>alone</u> account for about 14 percent of the tin mill products used in the United States. A tariff-based remedy that increases domestic tin

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[44] <u>See</u> ITC Remedy Hearing Transcript, Nov. 6, 2001 at 298 (testimony of Mr. Thomas Scrimo of U.S. Can Company) (emphasis added). An excerpt of this testimony is attached at **Exhibit 1**.

[45] <u>See</u> Affidavit of Marc Seanor of Ball Corporation, attached as Exhibit 1 to CMC's Posthearing Brief on Remedy, Nov. 13, 2001 (emphasis added). A copy is attached at **Exhibit 2**.

mill prices will, therefore, significantly intensify the pressure being experienced by tin mill producers as a result of competition from alternative forms of packaging. Demand for tin mill products will be artificially suppressed as consumers of cans switch to alternative packaging, leading to further reductions in U.S. tin mill shipments.[46] Given the importance of customer packaging preferences in the domestic tin mill industry, restrictions which diminish the price competitiveness of steel packaging will only lead to further financial losses for domestic tin mill producers.

Second, high tariffs will also impose greater economic costs on U.S. can manufacturers, contrary to national economic interests.[47] Tin mill products account for approximately 60-75% of steel can manufacturers' marginal production costs.[48] Any increase in tin mill prices will increase can manufacturers' production costs at a time when the domestic can manufacturing industry is already experiencing difficult market conditions and reduced profitability. Mr. Tom Scrimo of U.S. Can Company described to the International Trade Commission the current economic challenges that domestic can manufacturers face:

> The domestic can manufacturing industry is a troubled one. We have recently seen severely declining profits and employment, as well as plant closures and other cost reductions. My company's experience is typical. Since 1998, U.S. Can has closed seven plants in six states. We have recently announced the closure of two additional plants. Our total workforce has declined by over 25 percent since 1998, mostly due to closures and layoffs.

[46] U.S. tin mill shipments declined by 9.4% during the period of investigation. See ITC Report at 73. During the first half of 2001, shipments fell by 10.1% as compared to the first half of 2000. See ITC Posthearing Staff Report at Table FLAT-C-8.

[47] See 19 U.S.C. § 2253(a)(1)(F)(ii) (directing the President to consider factors related to national economic interests including impact of any remedy on consumers and competition in the U.S. market).

[48] See ITC Remedy Hearing Transcript at 296 (testimony of Mr. Thomas Scrimo).

> Our industry is a no or low growth business, with marginal profit levels. In addition to competition from other packaging forms, we are being pressured by the consolidation of our customer base. As large retailers, like Wal-Mart and Home Depot, enjoy increasingly larger shares of the supply chain, our customers, who supply them, demand the best quality, service, and price, or we lose their business. We are caught literally between steel suppliers, who want higher prices, and customers, who want lower ones. An increase in our steel cost would only make a bad situation worse.[49]

The detrimental impact on U.S. can manufacturers is compelling. The steel can industry workforce is comprised of approximately 15,000 employees – three times the workforce of the domestic tin mill industry.[50] Thus, in terms of employment, far more U.S. workers in the can manufacturing industry are likely to be negatively impacted should the United States impose additional duties on tin mill imports. A remedy intended to assist one industry but has the potential to cause greater negative employment impacts for another U.S. industry obviously is not in the best national economic interests, particularly during a period of economic recession.

In sum, even assuming arguendo that tin mill imports have contributed to the domestic tin mill industry's injury, the imposition of prohibitive tariffs on products accounting for, on average, only 2% of all flat-rolled product imports will not facilitate positive adjustment.[51] Tariffs will not help domestic tin mill producers but will only serve to aggravate the pressures that compel consumers to substitute other forms of packaging.

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[49] Id. at 298-99.

[50] Id. at 299. The domestic tin mill industry employed 5,733 workers in 2000, which declined to 5,584 workers during the first half of 2001. ITC Report at 74.

[51] See e.g., ITC Posthearing Staff Report at Tables FLAT-3 and FLAT-10.

IV. ALTERNATIVE REMEDIES

A. Quotas Are Neither A Necessary Nor An Appropriate Remedy To Assist Domestic Tin Mill Producers

Quotas can be an effective remedy where limited imports are necessary, i.e., to cure the increase in imports that has substantially caused serious injury. Here, however, the only increase in tin mill imports occurred in 1999 and the first quarter of 2000 when Japanese imports reached unprecedented levels. As shown in Table 2 above, antidumping relief has remedied that import surge, returning current imports at levels fully consistent with pre-Japan surge levels. In fact, as Table 2 shows, imports are currently below pre-surge 1994 levels and almost identical to 1995 imports.[52] In addition, as the Commission found, imports are not likely to surge in the imminent future.[53]

Quantitative restrictions are not permitted to reduce imports below recent representative levels. [54] Given that imports are already consistent with those levels, no purpose would be served by quantitative restrictions. Moreover, as the International Trade Commission recognized, the domestic tin mill industry was not profitable even in periods when imports were

[52] As shown in Table 2, the annualized 2001 level of non-NAFTA imports (based on January - October import data) is 429,422 short tons. This is 28.6 percent decline from non-NAFTA import volumes in 1999.

The return of tin mill imports to this "equilibrium" is not a surprise. As U.S. steel can manufacturers explained to the International Trade Commission in detail, there is a natural limit on the amount of tin mill imports that can manufacturers are willing to use. See CMC's Prehearing Brief on Injury at 4-5; Transcript for ITC Hearing on Injury, September 20, 2001, at 1157, 1161, hereinafter "ITC Injury Hearing Transcript." This "natural limit" is a result of the paramount importance of timely and flexible delivery schedules, the risks inherent in reliance on offshore supply, and other particular circumstances specific to the operations of various U.S. can manufacturers. See ITC Injury Hearing Transcript at 1157, 1160-61; CMC's Prehearing Brief on Injury, Exh. 1 para. 4, Exh. 2 para. 9, Exh. 3 para. 3, Exh. 4 paras. 3-4. See also CMC's Prehearing Brief on Injury, Exh. 2 para. 11, Exh. 3 para. 5, Exh. 4 paras. 5-7.

[53] ITC Report at 77-78.

[54] 19 U.S.C. § 2253 (e)(4). With respect to tin mill products it is not possible to suggest that a different, lower quota level would be justified given the domestic industry does not consider pre-1999 levels to have been injurious. See Injury Hearing Transcript at 1122 (Roger Schagrin, counsel to the domestic industry, stating "as to tin . . . 1999 is definitely when the injury began, it's when imports surged by a couple of hundred thousand tons, and it happened to be when the case against Japan was brought.")

at or below their average historical levels.[55] Quantitative limitations simply would not help the domestic industry make positive adjustments to import competition.[56]

B. Tariff Rate Quotas Would Not Provide Relief to the Domestic Tin Mill Industry

A tariff rate quota can be a useful remedy in certain situations, particularly when tariffs or quotas prove to be excessive. In this case, however, as discussed above, restricting the volume of imports will not assist domestic tin mill producers, and tariffs certainly will not be effective. There is no reason to assume that a combination of these tools would be any more effective.

While tariffs, quotas or tariff rate quotas applied to tin mill imports will be ineffective in improving the long-term condition of domestic tin mill producers, the President must recognize that the domestic tin mill industry is already taking the most critical steps toward positive adjustment to import competition: the closure of excess domestic capacity.[57] The recent capacity reductions will have the effect of significantly improving the capacity utilization (and, by

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[55] ITC Report at 77.

[56] Even if tin mill imports are considered in the context of a single flat-rolled industry, it is clear that a reduction in the already extremely small percentage of flat-rolled imports made up of tin mill products could not have a significant positive effect on the flat-rolled industry as a whole. For example, the volume of imports of non-NAFTA tin mill product comprised only 2.8 % of all flat-rolled products in 2000. See ITC Posthearing Staff Report at Tables FLAT-3 and FLAT-10.

[57] In October, 2000 LTV announced the closure of its Aliquippa, plant. "LTV Sells Mill, Suspends Dividend," The Plain Dealer, Oct. 6, 2000, at 1C. LTV then sold its tin mill operations to U.S. Steel. See id.; see also "LTV Steel Abandons Tinplate; Sells Business to U.S. Steel," Purchasing, Nov. 2, 2000. U.S. Steel, for its part, announced on August 14 of this year that it will shut down the tin mill operations at its Fairless Works in November 2001. Scott Robertson, "Fairless' Exit May Strengthen Tin Market," American Metal Market, Aug. 14, 2001. These two decisions alone will reduce excess domestic tin mill capacity by approximately one million tons. Id. Domestic producers have recognized the need for and the positive impact of these closures.

An LTV Steel spokesman noted that "the tin mill business has been underperforming for a long time." See "LTV Steel Abandons Tinplate; Sells Business to U.S. Steel," Purchasing, Nov. 2, 2000. Richard Garan, Weirton Steel's assistant treasurer, stated that "{w}e view (the closing of the tin operations) as a positive . . . {a}nything that takes capacity out of the market is a positive." See Fairless' Exist May Strengthen Tin Market," American Metal Market, Aug. 14, 2001.

extension, the financial results) of domestic producers -- even assuming the continued presence of imports at representative levels.[58]

At this point, the domestic tin mill industry will not benefit from quantitative restrictions or duties placed upon tin mill imports. The domestic industry's own rationalization in response to contracting demand, combined with the imposition of antidumping discipline on Japanese imports, has already created the environment for the domestic tin mill industry to improve. Import restrictions in any form would only reduce tin mill imports below their long-term historical role in the U.S. market, with adverse effects upon the domestic can industry, contrary to the statutory directive that remedies provide "greater economic benefits than costs."[59]

C. Trade Adjustment Assistance Would Be A Meaningful Remedy for the Domestic Tin Mill Industry

As demonstrated above, the Title VII relief put in place last year has remedied the 1999 surge in tin mill imports. Tin mill imports have returned to pre-surge levels. Tin mill import prices have oversold the prices of domestic products.[60] The domestic industry is, in addition, rationalizing domestic capacity. Unfortunately, workers at these closed plants have been displaced, and, consequently, adjustment assistance would be a highly appropriate tool for assisting domestic producers and their employees to cope with these important positive changes.

The President should, in this case, provide domestic tin mill producers with assistance under existing programs.[61] These mechanisms will undoubtedly provide significant support to

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[58] See Joint Tin Mill Respondents' Prehearing Brief on Injury, at 22-27.

[59] 19 U.S.C. § 2252(a).

[60] See ITC Posthearing Staff Report at Table FLAT-75.

[61] Existing programs, from the Labor Department, for example, provide assistance to workers who have lost their jobs due to the type of rationalization being undertaken in the tin mill sector (19 U.S.C. § 2271). The Commerce

the domestic tin mill industry's efforts to rationalize and develop new products. CMC members -- tin mill purchasers -- have been actively working with a number of domestic producers to help them develop the capability to supply new products.[62] Government programs will serve to enhance the ability of domestic producers to develop these new products. Domestic tin mill producers are the primary suppliers for all of the CMC's members and will remain so. CMC respectfully submits that trade adjustment assistance -- funds that will enable positive adjustment to import competition -- is the best possible remedy for tin mill producers. Restrictions on the limited, fairly traded imports used by CMC members will not lead to positive adjustment, but will only hurt CMC members.

V. IF A REMEDY OTHER THAN TRADE ADJUSTMENT ASSISTANCE IS PROVIDED, THE ONLY APPROPRIATE REMEDY IS A QUOTA BASED ON RECENT REPRESENTATIVE IMPORTS, WITH PROVISION FOR ADDITIONAL IMPORTS IF NECESSARY

Tin mill imports have had a significant and longstanding presence in the U.S. market. It is a presence that -- until 1999 with the surge of Japanese imports -- has never given rise to complaints by U.S. producers.[63] This is because tin mill imports are, necessarily, a supplement to U.S. suppliers who account for an overwhelming share of the domestic tin mill market.[64]

It is important to domestic tin mill purchasers that this level of supply continues to be available. Additional tariffs, however, would create a substantial burden for tin mill purchasers,

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Department may provide assistance for new product development (19 U.S.C. § 2355). The Emergency Steel Loan Guarantee Act (15 U.S.C. § 1841 note) authorizes substantial loan guarantees to qualified steel companies.

[62] See, e.g. CMC's Prehearing Brief on Injury, Exh. 3 at para. 4.

[63] The 1999 Japan antidumping case is the only unfair import relief action ever brought against tin mill imports. ITC Posthearing Staff Report, at Table Overview 1.

[64] See ITC Posthearing Staff Report, at Table FLAT-57 (showing U.S. producers' shipments accounting for an average of 86% of U.S. market share based on quantity) from 1996 through 2000.

given the extremely thin margins in the can business and the fact that tin mill products represent the single largest raw material input into steel can production.

CMC respectfully submits that there is a strong case with respect to tin mill products for the provision of trade adjustment assistance as the appropriate remedy. If, however, the President imposes some other remedy, CMC submits that a quota is the most appropriate approach. A quota at a recent representative level would ensure that CMC members can continue critical supply arrangements,[65] and would cause the least market disruption. This is particularly important given the recent rationalization of domestic supplies.

In addition to a quota, however, CMC respectfully requests the inclusion of some type of "emergency" short supply mechanism. The Can Manufacturers are concerned that a quota could prove devastating in the event of a catastrophic occurrence (such as the Weirton fire in 1994 and the more recent fire at UPI) that would leave any one of the domestic tin mill producers (who are decreasing their capacity) unable to supply necessary material. Because every can manufacturer relies so heavily on domestic tin mill suppliers, a major domestic supply disruption could not be satisfied quickly or completely within the domestic market. This is especially true given the welcomed closure of the Aliquippa and Fairless plants.

Accordingly, although CMC recognizes that such an approach is not typical in Section 201 cases, CMC respectfully requests the establishment of a short supply mechanism -- if a quota is imposed.

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[65] A quota based on a level of imports entered during the most recent representative three year period would be roughly 400,000 tons no matter what period is chosen. A reasonable period for calculating the recent representative level of tin mill products might be 1997, 1998 and 2001, three recent years with representative import levels. The average non-NAFTA imports for those three years, using the figures shown in Table 2 would be 395,235 tons, (legislative history makes clear that the three recent, representative years need not be consecutive. H.R. Rep No. 103-826 (I), at 131(1994) reprinted in 1994 U.S.C.C.A.N. 3773, 3903.) Even looking at the less "favorable" period 1996-1998 the three year pre-Japan surge period, non-NAFTA imports averaged 385,194 short tons. See Table 2.

VI. EXCLUSIONS

CMC members have requested exclusions for a number of tin mill products which are not available from domestic suppliers. Those exclusion requests were submitted to USTR with documentation supporting claims of unavailability.

VII. CONCLUSION

The Can Manufacturers' Coalition respectfully submits that, for the reasons detailed above, the Commission's decision should be treated as a negative determination with respect to tin mill imports. Accordingly, these imports should be excluded from any remedial measure taken in this safeguard proceeding. If, however, the President decides to make an affirmative determination, and that some action is appropriate, CMC urges the President to reject the recommendation of additional duties on tin mill imports. Such measures would result in significant economic burdens on U.S. can manufacturers and would ultimately hurt rather than help domestic tin mil producers.

Respectfully submitted,

/s/ Valerie A. Slater
Valerie A. Slater, Esq.
S. Bruce Wilson, Esq.
Karen Bland Toliver, Esq.
Wendy E. Kamenshine, Esq.

Counsel to the Can Manufacturers' Coalition

<u>Exhibit 1</u>

UNITED STATES
INTERNATIONAL TRADE COMMISSION

In the Matter of:	)	
	)	Investigation No.: TA-201-73
STEEL (REMEDY PHASE)	)	

Pages: 1 through 428

Place: Washington, D.C.

Date: November 6, 2001

HERITAGE REPORTING CORPORATION

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COMMISSIONER KOPLAN: Thank you. It's my understanding that concludes this segment of the presentation and that we now turn to tin mill, a five-minute presentation.

MS. SLATER: Thank you, Mr. Chairman. Valerie Slater for the Can Manufacturers' Coalition. We're going to use our very brief time today to let you hear from the industry. The legal arguments have been laid out in our brief. Mr. Thomas Scrimo from U.S. Can Company will give some testimony and Mr. Marc Seanor, who is here from Ball Corporation, is available for questioning. Tom?

MR. SCRIMO: Good afternoon. My name is Tom Scrimo. I'm Senior Vice President --

COMMISSIONER KOPLAN: Could you move your microphone a little closer, please?

MR. SCRIMO: -- and General Manager at the United States Can Company. Our company produces steel aerosol cans used for personal care products, steel cans for paint and other products.

There are some important factors that must be taken into account, as you consider relief for tin mill products. As a starting point, it is important to recognize that tin mill products account for about 60 to 75 percent of the marginal cost of producing steel cans. As a result, any increase in the cost of steel has a direct and significant impact on our production cost.

This fact is -- for two reasons. First, any steps that significantly increase the price of tin mill products in the United States ultimately hurt the very steel producers you are trying to help. Steel packaging of all types is under intense competition, alternative forms of packaging.

In the food industry, volume is being eroded with tuna in a pouch. Steel juice containers have been converted to plastic jugs and paper cartons. In aerosol, paint and general line containers, we have seen steel cans replaced by plastic pump sprays, aluminum containers, and plastic products. A significant increase in the cost of tin plate and, consequently, steel cans would result, in my view, in the migration of a significant segment of steel packaging to alternative packaging.

Let me give you just one example. Today, about 350 million one-gallon paint cans produced in the United States each year are made of steel. Paint can buyers are continually evaluating the economics of shifting from steel to plastic. We believe that a cost difference of as little as two to three percent would lead customers to switch. Behr Paint has already switched around 30 million one-gallon paint cans it currently purchases annually from steel to plastic. Restrictions on tin mill products will have the effect of shrinking the already declining demand for tin mill products to the detriment of both domestic steel producers and can manufacturers. Paint cans that could be switched to plastic account for about three percent of the tin mill consumed in the United States, but they are just one example of the shifts that are likely to occur, if tin mill prices are pushed up.

Other vulnerable sectors: pet food cans, for example, would also likely suffer a loss. Mr. Seanor of Ball Corporation is here today and he can answer any questions concerning potential shifts in the food can market.

Let me turn to my second point. The domestic can manufacturing industry is a troubled one. We have recently seen severely declining profits and employment, as well as plant closures and other cost reductions. My company's experience is typical. Since 1998, U.S. Can has closed seven plants in six states. We have recently announced the closure of two additional plants. Our total workforce has declined by over 25 percent since 1998, mostly due to closures and layoffs.

Our industry is a no or low growth business, with marginal profit levels. In addition to competition from other packaging forms, we are being pressured by the consolidation of our customer base. As large retailers, like Wal-Mart and Home Depot, enjoy increasingly larger shares of the supply chain, our customers, who supply them, demand the best quality, service, and price, or we lose their business. We are caught literally between steel suppliers, who want higher prices, and customers, who want lower ones. An increase in our steel cost would only make a bad situation worse.

Trade sanctions would not help domestic steel makers and would damage domestic can producers and our approximately 15,000 employees. U.S. tin mill producers are and will remain our principle suppliers. They have already taken important steps to reduce over capacity.

Japanese imports have been addressed. Imports have been declining. Restrictions on tin mill imports are not the answer. We do, however, support adjustment assistance for the workers affected by the recent closures and for development of specialty products that are now available from offshore sources. We urge you not to impose restrictions on the importation of tin mill products, but to recommend steps that would benefit the domestic tin mill industry, without creating an artificial competitive disadvantage for the domestic can industry.

Thank you.

COMMISSIONER KOPLAN: Thank you. I understand that concludes this segment of the presentation and we now

<u>Exhibit 2</u>

BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of: Section 201 Investigation of Certain Steel Imports	Investigation No.: TA-201-73

AFFIDAVIT OF MARC SEANOR

Marc Seanor, being first duly sworn, hereby states as follows:

1. I am the Director of Steel Purchasing for the Packaging Operations of Ball Corporation ("BALL"). I have held this position since 1997. Ball, through its subsidiary Ball Metal Food Container Corp. is one if the largest U.S. producers of steel cans for the food industry. I have been in the steel can business and involved with the purchase of tin mill products for 15 years.

2. Steel packaging currently competes vigorously with alternative forms of packaging such as plastic, aluminum and glass. While decisions concerning the type of packaging used for food and consumer products take into account a variety of factors, cost is a significant consideration in our customers' decisions concerning their choice of packaging. Furthermore, many of our customers are continually evaluating potential shifts from steel to alternate packaging forms.

3. Therefore, in my opinion, any action that significantly increases the cost of tin mill products in the United States, will increase the cost of the steel containers produced from these products and will likely cause or accelerate shifts from steel packaging to alternative packaging forms. There are certain segments of the food packaging market that are currently particularly vulnerable to shifts at the current time. For example, the large one-gallon steel cans used to package food for institutional use (called "gallons"), and 6-ounce pet food cans are products segments in which customers are actively evaluating moves to plastic alternatives. Together, these two products segments alone account for about 11 percent of the tin mill products used in the United States. A significant price increase for these products would hurt U.S. steel can manufacturers as well as U.S. tin mill producers by creating a competitive disadvantage for the steel packaging, and contributing to shifts to alternative packaging forms.

/s/ Marc Seanor____________
Marc Seanor

STATE OF COLORADO)
) ss.
COUNTY OF JEFFERSON)

Subscribed and sworn to before me this _____ day of November 2001.

/s/ Jeanne L. Blackwell
Notary Public

My commission expires: _(Notarized)___